

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma, et al.,)	Case No. 4:05-cv-00329-GKF-PJC
)	
Plaintiffs,)	DEFENDANTS' RESPONSE IN
)	OPPOSITION TO PLAINTIFFS'
vs.)	"MOTION IN LIMINE PERTAINING
)	TO EVIDENCE OR ARGUMENT
Tyson Foods, Inc., et al.,)	SUGGESTING THE POLLUTION AT
)	ISSUE SHOULD BE REMEDIED BY
Defendants.)	SOME OTHER ENTITY" (DKT. 2434)
)	

Defendants jointly oppose Plaintiffs' wide-sweeping motion in limine at Docket No. 2434 seeking to prevent Defendants "making any argument, doing any questioning or proffering any evidence" regarding the proper entity to perform any ordered remediation, and to preclude any "argument or testimony" that "suggest[s] ... that the [alleged] pollution problems suffered in the IRW would be addressed by some entity other than the Court." (Dkt. No. 2434 at 1-2.) The motion specifically seeks to bar all reference at trial to the roles, actions, or inactions of the Oklahoma Legislature, the "various agencies of the States of Oklahoma or of Arkansas," and the Arkansas / Oklahoma Compact Commission. (*Id.*) Plaintiffs insist that "any argument suggesting, implying or stating that the issues raised herein should be placed before any other entity is irrelevant and would only serve to confuse the jury." (*Id.* at 2.) Because the motion seeks to bar highly probative admissible evidence to the extreme prejudice of Defendants, the Court should deny it.

Plaintiffs base their entire motion in limine on two faulty premises. First, Plaintiffs assert that because this Court declined under the doctrine of primary jurisdiction to stay the case in deference of the regulatory authorities, all reference to the actions, inactions, roles, or abilities of any entities other than "the State of Oklahoma" and this Court are necessarily irrelevant. (*See id.*

at 2.) Second, Plaintiffs contend that because they are proceeding under some statutory authority, “any references at trial to further need for legislation is entirely conjectural and speculative, irrelevant, and should not be allowed.” (Id.)

A. The Court’s Decision Not to Employ the Discretionary Doctrine of Primary Jurisdiction Does Not Make “Other Entity” Evidence Irrelevant.

The standard for relevancy under the Federal Rules is broad and necessarily depends upon the totality of the facts potentially involved at trial. As the Tenth Circuit very recently explained, “[e]vidence is relevant and therefore admissible if it has any tendency to make a fact of consequence more or less likely.” United States v. Beltran-Garcia, 2009 U.S. App. LEXIS 17070, at *16 (10th Cir. July 28, 2009) (unpublished). Put slightly differently, “[e]vidence is considered relevant under the federal rules if it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” Owner-Operator Indep. Drivers Ass’n v. USIS Commer. Serv., 537 F.3d 1184, 1193 (10th Cir. 2008) (quoting in part Fed. R. Evid. 401).

Plaintiffs’ motion rests largely on their blanket assertion that this Court’s discretionary decision to maintain its jurisdiction over the case now renders any and all evidence and argument regarding any other entity legally irrelevant. (Dkt. No. 2434 at 2-3.) Plaintiffs make the same argument in support of their motion to exclude evidence, argument, and questioning about agency inaction (see Dkt. No. 2433 at 2), and Defendants incorporate their response to Dkt. No. 2433 herein by reference rather than repeating it again here in its entirety. (See Dkt. No. 2481: Defs.’ Resp. to Pls.’ Mot. in Limine Regarding Agency Inaction.)

In brief, as counsel for Plaintiffs explained during oral argument on Defendants’ motion to stay this action in deference to the Oklahoma and Arkansas regulatory authorities, “the doctrine of primary jurisdiction ... is to ensure the proper relationship between the courts and the

agencies and also promote uniformity and consistency in the way that things are done.” (July 5, 2007 Hrg. Tr. at 78:21-24: Dkt. No. 1216.) The Court entered no findings on the issue of primary jurisdiction, but Court simply exercised its discretion not to apply the doctrine here. (Id. at 101:16-19: “And as to the issue of primary jurisdiction, although there are some compelling arguments made by the defendants, with due respect I do believe that plaintiffs carry the day on that issue as well.”) The Court’s denial of Defendants’ Motion to Stay at Docket No. 133 included no rulings or comments about the relevance of evidence or argument regarding other entities.

The question of whether an issue is *dispositive*, as urged in the primary jurisdiction motion, is a far different question from whether evidence relating to an issue is *relevant*, particularly when the dispositive question is placed entirely within a court’s discretion. Plaintiffs’ contention that this Court’s primary jurisdiction ruling renders all “other entities” evidence “irrelevant and inadmissible” ignores this distinction, and Plaintiffs fail to cite any case law in support of their position. (Dkt. No. 2434 at 3.)

On the contrary, this evidence easily meets the “liberal standard for relevance” in the Federal Rules. See Owner-Operator, 537 F.3d at 1193. For instance, such evidence and argument is relevant to whether any injunctive relief is necessary (or even advisable), and to the scope of any such injunction. Federal courts are rightfully reluctant to use their extraordinary injunctive powers where the party requesting the injunction is capable of achieving the same results through its own political and administrative processes – that is, without the court’s intervention – especially in the RCRA context. See Hallstrom v. Tillamook County, 844 F.2d 598, 601 (9th Cir. 1987) (“Section 6972(b) and its legislative history reflect Congress’s belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental

disputes than can the courts. ... Litigation should be a last resort only after other efforts have failed.”). Here, Oklahoma officials have the ability to ample power under existing state law to abate any imminent environmental or health threat, or to stop any continuing trespass or nuisance, but have declined to exercise that power. Neither has Oklahoma asked Arkansas to help it in addressing the issue of bacteria in the IRW. All of this evidence is relevant to – and weighs against – issuance of any injunctive relief for Plaintiffs. See id.

In addition, evidence concerning other state, federal, and tribal entities is also relevant to the scope of any proposed injunction and the issue of whether such an injunction will override or impair the existing efforts of such entities to balance environmental concerns with the needs of farmers and ranchers. For example, both Arkansas and Oklahoma agencies have approved and continue to approve Nutrient Management Plans permitting farmers to land-apply poultry litter to certain fields under certain conditions. The effect that any proposed injunction would have on those plans and on the government efforts and policies they reflect are certainly considerations that the Court should take into account in considering whether an injunction is justified and, if so, what shape it should take.

Further, “other entities” evidence is relevant to the scope of the injunction Plaintiffs’ seek. If an injunction were to try to distinguish between the “proper” and “improper” land application of poultry litter, the Court would necessarily be placed in a position of determining on a grower-by-grower and field-by-field basis which land applications are proper and which are not. “Courts should be, and generally are, reluctant to issue ‘regulatory’ injunctions, that is, injunctions that constitute the issuing court an ad hoc regulatory agency to supervise the activities of the parties.” Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273, 277-78 (7th Cir. 1992). That reluctance is particularly justified here,

where both Oklahoma and Arkansas already have regulatory agencies with the authority, the expertise, and the legal charge to make just such judgments. In other words, the fact that Plaintiffs have available to them other entities that are far better suited to implement any injunctive relief granted here is indeed relevant.¹

B. Plaintiffs Fail to Demonstrate that the Unfair Prejudicial Effect of Evidence Concerning “Other Entities” Outweighs Its Probative Value.

Plaintiffs also contend that this Court should exclude “other entity” evidence under Federal Rule of Evidence 403. In particular, Plaintiffs claim that any “testimony or comment on the State’s decision to pursue the Defendants in this case suggests an alternative when none really exists,” and that such suggestion “would undoubtedly mislead the jury” (Dkt. No. 2434 at 3-4.) Although Plaintiffs clearly view their litigious approach as the only appropriate means of addressing the issue of litter application, the evidence will in fact demonstrate that many entities other than the Plaintiff-defined “the State of Oklahoma” could have but chose not to pursue the remedies Plaintiffs seek in this lawsuit against Defendants. The fact that none of these agencies or entities (including Oklahoma’s Legislature) have done so is highly probative on numerous grounds, as explained fully in Defendants’ Response to Plaintiffs’ similar motion in limine to bar all evidence of agency inaction at Dkt. No. 2481.

The Tenth Circuit recently remarked that “[u]nder Rule 403’s balancing test, it is not enough that the risk of unfair prejudice be greater than the probative value of the evidence; the danger of that prejudice must substantially outweigh the evidence’s probative value.” United States v. Cerno, 529 F.3d 926, 936 (10th Cir. 2008) (citations omitted). Further, in engaging in

¹ See also Defs.’ Resp. to Pls.’ MIL at Dkt. No. 2433 (addressing numerous other related areas of potential relevance).

the requisite balancing, courts must “give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.” *Id.* (citation omitted). Here, the great probative value of this evidence easily outweighs any potential for jury confusion, particularly since this trial will likely not involve a jury. (See Defs.’ Brs. in Supp. Mot. Strike Jury Demand: Dkt. Nos. 2388, 2463.)

Even in the event that this case were tried before a jury, Plaintiffs are free to offer rebuttal evidence and to cross examine any defense witness on these issues. Nothing reasonably suggests that the State of Oklahoma would be unduly prejudiced or the factfinder misled by straightforward evidence regarding the State’s own agencies’ and Legislature’s powers, authorities, and actions – or lack thereof – or those of the U.S. Environmental Agency, agencies of the State of Arkansas, or organs of the Cherokee Nation. Evidence of the inconsistency between the “State of Oklahoma’s” position in this litigation and the positions of other government agencies in their day-to-day dealings with the issue of poultry litter will undoubtedly be prejudicial to Plaintiffs’ claims, but that prejudice is a product of Plaintiffs’ own actions and is in no way unfair.

On the contrary, exclusion of this evidence that is highly probative to so many aspects of this case would work severe prejudice to Defendants and introduce error into the trial record.

See, e.g., Owner-Operator, 537 F.3d at 1193 (describing abuse of discretion standards).

CONCLUSION

For all of these reasons and those expressed in Defendants’ Response at Docket No. 2481 to Plaintiffs’ similar motion in limine regarding agency inaction, the Court should deny Plaintiffs’ motion in limine at Dkt. No. 2434 to bar “Evidence or Argument Suggesting the Pollution at Issue Should Be Remedied by Some Other Entity.”

Date: August 20, 2009

Respectfully submitted,

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

BY: /s/ John H. Tucker
JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173
(918) 592-3390 Facsimile
And

DELMAR R. EHRICH
BRUCE JONES
KRISANN C. KLEIBACKER LEE
FAEGRE & BENSON LLP
200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000
(612) 766-1600 Facsimile
**ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY
PRODUCTION LLC**

BY: /s/ Michael Bond
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
MICHAEL BOND, AR Bar No. 2003114
ERIN WALKER THOMPSON, AR Bar No. 2005250
DUSTIN DARST, AR Bar No. 2008141
KUTAK ROCK LLP
234 East Millsap Road Suite 400
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-AND-

STEPHEN L. JANTZEN, OBA No. 16247
PATRICK M. RYAN, OBA No. 7864
PAULA M. BUCHWALD, OBA No. 20464
RYAN, WIALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766
E-Mail: sjantzen@ryanwhaley.com

-AND

THOMAS C. GREEN
MARK D. HOPSON
TIMOTHY K. WEBSTER
JAY T. JORGENSEN
GORDON D. TODD
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-AND

ERIK J. IVES
SIDLEY AUSTIN llp
One South Dearborn
Chicago, IL, 60603
Telephone: (312) 853-7067
Facsimile: (312) 853-7036
**ATTORNEYS FOR TYSON FOODS, INC.; TYSON
POULTRY, INC.; TYSON CHICKEN, INC; AND
COBB-VANTRESS, INC.**

BY: /s/ A. Scott McDaniel
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
A. SCOTT MCDANIEL, OBA 16460
NICOLE LONGWELL, OBA 18771
PHILIP D. HIXON, OBA 19121
McDaniel, Hixon, Longwell & Acord, PLLC
320 S. Boston Avenue, Suite 700
Tulsa, OK 74103

-AND-

SHERRY P. BARTLEY, AR BAR #79009

MITCHELL WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
ATTORNEYS FOR PETERSON FARMS, INC.

BY: /s/ Randall E. Rose
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
RANDALL E. ROSE, OBA #7753
GEORGE W. OWENS, ESQ.
OWENS LAW F P.C.
234W. 13 Street
Tulsa, OK 74119
-AND-

JAMES MARTIN GRAVES, ESQ.
GARY V. WEEKS, ESQ.
WOODY BASSETT, ESQ.
VINCENT O. CHADICK, ESQ.
K.C. DUPPS TUCKER, ESQ.
BASSETT LAW FIRM
POB 3618
Fayetteville, AR 72702-3618
**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/John R. Elrod
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
JOHN R. ELROD
VICKI BRONSON, OBA #20574
BRUCE WAYNE FREEMAN
CONNER & WINTERS, L.L.P.
100 W. Central Street, Suite 200
Fayetteville, AR 72701
ATTORNEYS FOR SIMMONS FOODS, INC.

BY: /s/ Robert P. Redemann
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
ROBERT P. REDEMANN, OBA #7454
WILLIAM D. PERRINE, OBA #11955
LAWRENCE W. ZERINGUE, ESQ.
DAVID C. SENGGER, OBA #18830
PERRINE, MCGIVERN, REDEMANN, REID, BARRY &
TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
-AND-
ROBERT E. SANDERS
STEPHEN WILLIAMS
YOUNG, WILLIAMS, HENDERSON & FUSILIER
Post Office Box 23059
Jackson, MS 39225-3059
**ATTORNEYS FOR CAL-MAINE FARMS, INC. AND
CAL-MAINE FOODS, INC.**

CERTIFICATE OF SERVICE

I certify that on the 20th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and a true and correct copy of the foregoing was sent via separate email to the following:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	Daniel.lennington@oag.ok.gov

Melvin David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis, P.C.	

Louis W. Bullock	lbullock@mkblaw.net
J. Randall Miller	rmiller@mkblaw.net
Miller Keffer & Bullock Pedigo LLC	

William H. Narwold
Elizabeth C. Ward
Frederick C. Baker
Lee M. Heath
Elizabeth Claire Xidis
Fidelma L Fitzpatrick
Motley Rice LLC
COUNSEL FOR PLAINTIFFS

bnarwold@motleyrice.com
lward@motleyrice.com
fbaker@motleyrice.com
lheath@motleyrice.com
cxidis@motleyrice.com
ffitzpatrick@motleyrice.com

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

jgriffin@lathropgage.com

Michael D. Graves
Dale Kenyon Williams, Jr.
COUNSEL FOR CERTAIN POULTRY GROWERS

mgraves@hallestill.com
kwilliams@hallestill.com

s/ John H. Tucker